Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1023

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, et al,

Petitioners,

MARTIN W. ESSEX, et al.,

Petitioners,

—vs—

MONA BRONSON, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals entered September 24, 1975 is not yet reported. The opinion of the Court of Appeals which granted permission to appeal from an interlocutory order is reported at 512 F.2d 718 (6th Cir. 1975). A petition for rehearing was denied on October 30, 1975. The opinion of the District Court is also unreported. All opinions are reproduced (at Appendix pages 1, 34 and 36 respectively) in the Appendix to the Petition filed by the Board of Education of the City School District of the City of Cincinnati.

JURISDICTION

The opinion of the Court of Appeals was entered

September 24, 1975. A Petition for Rehearing filed by the Cincinnati defendants was denied on October 30, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Whether despite the existence of prior litigation against the Cincinnati Board Petitioners, the court below correctly applied the applicable law in such a way as to permit the development of a full evidentiary record at the time of trial.

STATEMENT OF THE CASE

This action was instituted by private plaintiff on May 25, 1974. It alleged on behalf of children in the Cincinnati Public Schools and their parents a present condition of racial segregation in the public schools in violation of the Fourteenth Amendment. The defendants included the local Board and Superintendent as well as the State Board of Education, State Superintendent and other State defendants. Separate, related Petitions for Certiorari have been filed on behalf of the "local" and "state" defendants. This response is in reply to both Petitions.

In the answer filed in the District Court both sets of defendants raised an affirmative defense to the action for certain periods of time under the doctrine of *res judicata*. Plaintiffs, Respondents herein, filed a Motion to Determine the Affirmative Defense. The District Court found that the defendants could properly assert "the collateral estoppel aspect of that general doctrine." (A. 4) However, the District Court certified the question under 28 U.S.C. §1292(b). The Court of Appeals granted the appeal, initially stating:

> The effect of this ruling appears to be that plaintiffs would be collaterally estopped from relitigating any of the issues determined in the prior litigation between the plaintiffs in the earlier class action and the defendant board *and from introducing evidence as to events occuring prior to July 26, 1965.* 512 F. 2d at 719 (emphasis added) (A. 11)

Following extensive briefs, oral arguments, and subsequent supplemental briefs, the Court of Appeals affirmed the order of the district court as modified and interpreted. The court quoted its earlier order and pointed out that it would be unable to affirm the order of the district court if their original understanding at the time of the acceptance of the appeal had turned out to be in fact correct. The Sixth Circuit was able to affirm because "upon restudy of the order and memorandum opinion we conclude that it does not preclude the introduction of evidence concerning events which occured prior to July 26, 1965 (A. 11)[1].

The Cincinnati Petitioners attempt to characterize this as a suit between the Board and the NAACP (Brief of Cincinnati Petitioners p. 6) to avoid the reality that this case involves parents and children presently constituents of the public education system of the State of Ohio and the City of Cincinnati who allege a present condition of unconstitutional segregation in the Cincinnati Public Schools.

The variety of projections of dire consequences suggested to this Court by both petitioners, notwithstanding, the entire opinion of the Court of Appeals demon-

[1]Both courts concluded that factual inquiry in *Deal* vs. *Cincinnati Board of Education*, 244 F.Supp. 572 (S.D. Ohio 1965) ended with the facts presented "up to July 26, 1965". (A. 5; 56).

strates its adherence to the doctrine of collateral estoppel and its application of the rule of "issue preclusion". (A. 10) The decision permits the district court to try the case on a full evidentiary record. The lower court is given discretion in the admission of evidence and consideration thereof in order to insure that all of the facts are developed to assist the lower court in "determining whether the present [segregated pupil enrollments] of the Cincinnati school system is a result of constitutional violations on the part of the defendants." (A. 13) The decision permits district court to consider, as to children presently in the system, facts not presented in *Deal* occuring prior to July 26, 1965 as well as post 1965 actions, inactions and policies of the defendants which have caused or contributed to the conditions of which plaintiffs complain (A. 10, 11). The decision calls upon the district court to make evidentiary determinations at the trial and permits it to consider historical and present facts as part of its duty as the trier of the facts to determine whether there is an observable pattern, or cumulative evidence of possible constitutional violations. The evidentiary ruling of the district court will, after the trial on the merits, be subject to review by the Court of Appeals in the context of the proof and the purposes for which it has been offered rather then in a partial vacuum. The court will thereby avoid piecemeal review. See: *Control Data Corporation* vs. *International Business Machines*, 421 F. 2d 323, 327 (8th Cir. 1970); cited with approval in *Pollock and Riley, Inc.* vs. *Pearl Brewing Company*, 498 F. 2d 1240, *rehearing denied*, 504 F. 2d 760, *cert. denied* 95 S.Ct. 1427 (1975).

ARGUMENT

Petitioners each have suggested that the Court of Appeals has somehow abandoned the doctrines of *res*

judicata or *collateral estoppel* and applied a different rule of law to school desegregation cases. An examination of the Court's opinion discloses its great respect and concern for each of these principles. The Court of Appeals noted that both *collateral estoppel* and *res judicata* are not rigidly applied. "Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice" *Tipler* vs. *E. I. DuPont DeNemours and Company*, 443 F. 2d 125, 128 (1971). (A. 9) The Court went on to note that the appeal required that it determine the extent to which the doctrine of *res judicata* should be applied in order to accommodate two competing public policies and avoid manifest injustice. It concluded that the district court was correct when it properly limited the application of the doctrine to this case by holding that the principle of *collateral estoppel* as opposed to *res judicata* should be observed. (A. 37) The Court went on to note that the original *Deal* case had been filed as a "spurious class action" under Rule 23 of the Federal Rules of Civil Procedure prior to the 1966 Amendment to the Rules. Under the old rule an adverse judgment in such an action was not binding on persons who were not parties to the class action. See 3B J. Moore's Federal Practice §23.10-1 at 23-2769; §23.11(3) at 23-2851. (A. 9)

The Sixth Circuit balanced the issue by applying the rule of "issue preclusion." See *Humphreys* vs. *Tann*, 487 F. 2d 666 (6th Cir. 1973), *cert. denied* U.S. 956 (1974); *Davis* vs. *McKennon and Mooney*, 266 F. 2d 870 (6th Cir. 1959); *Bernard* vs. *Bank of America*, 19 Cal. 2d 807, 122 P. 2d 892 (1942). (A. 10)

The plaintiff children in this case were either not born in 1965 or had not yet started to school. Their claims were not in existence at the time of the judg-

ment in *Deal* and could not have been extinguished by it. *Lawlor* vs. *National Screen Service Corporation*, 349 U.S. 322, 328 (1955). The complaint of such children and their parents of alleged continuing acts subsequent to 1965 declares a different cause of action than that concluded by *Deal*, one to which estoppel does not apply. *Cream Top Creamery* vs. *Dean Milk Co.*, 383 F. 2d 358, 363 (6th Cir. 1967); *United States* vs. *General Electric Company*, 358 F.Supp. 731, 740 (S.D.N.Y. 1973). (A. 10-11) The Court held that these plaintiffs, in order to establish their claim of a present denial of constitutional rights, must be permitted to show whether the post 1965 actions, inactions, and policies of the defendants have caused or contributed to the condition of which they complain. This evidence cannot be considered in a vacuum. (A. 11)

The Court of Appeals has properly left to the district court the determination of the admissibility of evidence. The District Court itself refrained from attempting to catalog or describe in advance evidence which will be admitted at the time of trial. With respect to new evidence of pre-*Deal* occurrences or conditions, if offered, the district court is to determine in each instance whether or not such evidence is relevant to the inquiry in the present case. (A. 12) As the Court of Appeals and the District Court noted, the ultimate decision in the present case will necessarily require the consideration of cumulative evidence. In establishing that cumulative evidence both parties will be able to utilize the facts and the findings of the Court in *Deal*. (A. 11-12)

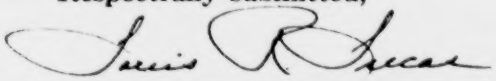
The path charted for the lower court by the Court of Appeals is not unclear. The district court is properly left with the traditional role of the finder of the facts. Its evidentiary determinations will be made in

the light of the reality of the evidence actually presented and the arguments advanced at that time and not in a vacuum. The opinion of the Court of Appeals directs the District Court to make a full evidentiary record and consider all of the relevant facts tending to illuminate the issue of whether or not there exists at the present time in the Cincinnati School district unconstitutional public school segregation. The decision of the Court is a narrow one, applicable to the facts of this case and subject to the full review process of the federal judicial system.

CONCLUSION

For the foregoing reasons the Petitions for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,



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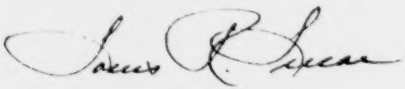
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Respondents' Brief In Opposition To Petitions For Writs of Certiorari has been served on all counsel of record by United States mail, postage prepaid on this 11th day of March, 1976.



LOUIS R. LUCAS